

**MINUTES OF THE OPEN SESSION
OF THE RHODE ISLAND ETHICS COMMISSION**

April 6, 2010

The Rhode Island Ethics Commission held its 7th meeting of 2010 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, April 6, 2010, pursuant to the notice published at the Commission Headquarters and at the State House Library.

The following Commissioners were present:

**Barbara R. Binder, Chair Edward A. Magro
J. William W. Harsch, Secretary** Mark B. Heffner
Frederick K. Butler John D. Lynch, Jr.*
Deborah M. Cerullo SSND**

Also present were Edmund L. Alves, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Staff Attorneys Jason Gramitt, Dianne L. Leyden and Esme DeVault; and Commission Investigators Steven T. Cross, Peter J. Mancini and Gary V. Petrarca.

At 9:10 a.m., the Chair opened the meeting. The first order of business was a motion to approve minutes of the Open Session held

on March 23, 2010. Upon motion made by Commissioner Cerullo and duly seconded by Commissioner Butler, it was unanimously

VOTED: To approve minutes of the Open Session held on March 23, 2010.

ABSTENTIONS: Edward A. Magro and Mark B. Heffner.

The next order of business was that of advisory opinions. The advisory opinions were based on draft advisory opinions prepared by the Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date. The first advisory opinion was that of Peter O. Masterson, a member of the Board of the Kent County Water Authority. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was present.

***Commissioner Lynch arrived at 9:15 a.m.**

Upon motion made by Commissioner Magro and duly seconded by Commissioner Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Peter O. Masterson, a member of the Board of the Kent County Water Authority.

ABSTENTION: John D. Lynch, Jr.

The next advisory opinion was that of Iva J. Lipton, Chairperson of the Town of Richmond Elder Affairs Commission. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was present.

****Commissioner Harsch arrived at 9:18 a.m.**

Upon motion made by Commissioner Cerullo and duly seconded by Commissioner Magro, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Iva J. Lipton, Chairperson of the Town of Richmond Elder Affairs Commission.

ABSTENTION: J. William W. Harsch.

The next advisory opinion was that of David S. Reis, a Supervising Environmental Scientist with the Rhode Island Coastal Resources Management Council. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was present. Staff Attorney DeVault distributed correspondence received from the Petitioner's supervisor regarding an alternate chain of command, and she recapped the facts and the draft opinion, which had been

presented at the last meeting. In response to Commissioner Cerullo, the Petitioner estimated that of the 1,200 applications handled by CRMC, applications submitted by the Land Trust would amount to between 0 and only 2 or 3 per year. He represented that he would alert his supervisor of any such application and his supervisor would take over.

The Petitioner informed that there is a biologist and engineer assigned to each application, but he only supervises the biologists. In response to Commissioner Cerullo, the Petitioner represented that the Deputy Director would handle assignments on Land Trust applications. Commissioner Cerullo asked the Petitioner to describe the general level of supervision he exercises. The Petitioner replied that he supervises all biologists who work within the state, but noted that most have 10 or more years of experience and require very little supervision. He stated that on large projects, or where certain issues presented, he would be assigned to work more closely on an application. In response to Commissioner Cerullo, the Petitioner stated that he does not perform job evaluations for performance or pay increases. Upon motion made by Commissioner Magro and duly seconded by Commissioner Butler to approve the draft opinion, there was discussion. Commissioner Cerullo stated that she is satisfied with the information presented. Upon the original motion, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to David S.

Reis, a Supervising Environmental Scientist with the Rhode Island Coastal Resources Management Council.

The next advisory opinion was that of Charles G. Newton, Jr., a member of the East Greenwich Planning Board. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was not present. In response to Commissioner Harsch, Staff Attorney DeVault explained that whether a business association is anticipated involves a matter by matter analysis, but she indicated that one would exist where there were ongoing negotiations as to a future contract. In response to Commissioner Lynch, Staff Attorney DeVault stated that a business associate relationship would cover individuals or entities that simply renewed their relationship each month or year. In response to Commissioner Cerullo, Staff Attorney DeVault stated that she is assuming that the sales force is soliciting broadly for potential advertisers. She reiterated that whether a business association exists is factually specific. Commissioner Butler noted that he had been concerned about marketing and maintaining client lists.

Commissioner Heffner expressed that he is troubled by the intermittent aspect of this fledgling company. He indicated that someone could be advertising and then realize that they have something before the Planning Board. He stated that the individual could stop advertising while the matter is pending and, with a wink and a nod, resume advertising once the matter is completed. He

questioned whether there could be a rule analogous to the revolving door prohibition. Chair Binder stated that it could almost be a quid pro quo situation, but she noted that it would be dealt with in a complaint context. Commissioner Cerullo expressed her belief that the draft opinion accurately lays out the law, but she inquired whether “anticipated” is defined well enough. Chair Binder noted that the draft opinion states that a matter by matter analysis is required and the Petitioner is encouraged to seek further guidance.

Commissioner Butler indicated that he is not as trouble by what constitutes an anticipated business association. He expressed that the fact that someone had been a client and would stop advertising for a time and then return after a decision is made presents the same wink and nod situation as if a non-client goes before the Planning Board and becomes a client after receiving a favorable decision. Commissioner Harsch commented that, as to the term “anticipated” being undefined, the opinion provides the Petitioner with safe harbor, but he defines the term at his peril. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Charles G. Newton, Jr., a member of the East Greenwich Planning Board.

The next order of business was discussion regarding conducting the Probable Cause Hearing in Executive Session. Chair Binder advised

that this issue was raised during the recent regulatory process and the Commission has received related correspondence from Operation Clean Government (OCG). Legal Counsel Alves informed that the Commission has cited to R.I. Gen. Laws § 42-46-5(a)(2) and (4) for purposes of conducting the hearing in Executive Session. He noted that section 5(a)(4) authorizes a public body to conduct investigatory proceedings in Executive Session and section 5(a)(2) authorizes the discussion of litigation matters in Executive Session. He stated that in his judgment both exemptions to the Open Meetings Act apply here.

Legal Counsel Alves advised that OCG's argument is that the Commission is acting in its adjudicatory capacity in closed session. He noted, however, that the Prosecution, Respondent and Respondent's counsel are also present and presenting argument based upon the investigation. He stated that in *RI ACLU v. Bernasconi*, the RI Supreme Court held that investigatory proceedings, such as the Chariho School Committee's discussion of its plans to search school lockers, are an appropriate subject for Executive Session under section 5(a)(4). He indicated that those discussions involved investigations or the need to conduct investigations. Legal Counsel Alves informed that the exemption is applicable to the probable cause hearing because it involves an investigation that has taken place and perhaps whether there is any need for further investigation. Legal Counsel Alves also stated his belief that section 5(a)(2) provides additional grounds for conducting

the hearing in Executive Session. He explained that the Attorney General has issued opinions interpreting the exemption to include anticipated litigation. He indicated that if it is realistic that a potential matter could reach litigation it would be appropriate for Executive Session. He stated that his advice to the Commission is to conduct the hearing in Executive Session.

In response to Commissioner Harsch, Chair Binder stated that the Commission would not hear from interested persons on the issue, as it had received comment at the public hearing on the regulations. Commissioner Harsch expressed that he is uncomfortable in this area and has a concern regarding the Commission tangling itself up in the investigatory function. He stated that he wants to be particularly careful, with all due respect to Legal Counsel's opinion, because the cited cases did not really apply to an adjudicatory body like the Commission. He indicated his belief that Legal Counsel's opinion is technically correct, but he voiced concerns regarding distinctions between the Commission and other public bodies, like school boards.

Legal Counsel Alves agreed that the Commission is acting in an adjudicatory capacity. He stated that its recent regulatory actions to clarify its role at each stage are well founded. He expressed that he stands by his judgment that the Open Meetings Act authorized a closed session here. In response to Commissioner Cerullo, Legal Counsel Alves indicated that the statute refers to the preliminary investigation, which he believes would not preclude the Commission

from conducting further investigation after probable cause.

At 9:47 a.m., upon motion made by Commissioner Butler and duly seconded by Commissioner Magro, it was unanimously

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4), to wit:

**a.) Motion to approve minutes of Executive Session held on
March 23, 2010.**

**b.) In re: Kevin J. Carter,
Complaint Nos. 2009-2 & 2010-1.**

c.) Motion to return to Open Session.

At 12:00 p.m., the Commission returned to Open Session. The next order of business was a motion to seal minutes of the Executive Session held on April 6, 2010. Upon motion made by Commissioner Lynch and duly seconded by Commissioner Magro, it was unanimously

VOTED: To seal minutes of the Executive Session held on April 6, 2010.

Chair Binder reported that the Commission took the following actions in Executive Session: 1) approved minutes of the Executive Session held on March 23, 2010, by unanimous vote; and 2) found that probable cause exists to support twenty of the twenty-one allegations contained in Complaint Nos. 2009-2 & 2010-1, In re: Kevin J. Carter.

The next order of business was a second vote to withdraw the Commission Initial Determination Policy. Senior Staff Attorney D'Arezzo advised that the Policy is inconsistent with the regulatory amendments which took effect on March 29th. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Butler, it was unanimously

VOTED: To withdraw (2nd vote) the Commission Initial Determination Policy.

The next order of business was a Legislative Update. Staff Attorney Gramitt informed that he testified before the House Judiciary Committee on Speaker Fox's bill, which has been held for further study. He indicated that he is in the process of obtaining the video of the hearing.

The next order of business was the Director's Report. Executive Director Willever advised that there are nine complaints and one advisory opinion pending. He reported that the Larisa appeal is pending and one formal APRA request has been granted since the

last meeting.

The next order of business was New Business proposed for future Commission agendas. There being none, at 12:06 p.m., upon motion made by Commissioner Harsch and duly seconded by Commissioner Magro, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch
Secretary